IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 600 OF 2006

IN

SUIT NO. 2618 OF 1988

Capt. G.L.Gunther ... Plaintiff

Versus

The Oil & Natural Gas Commission

& Anr. ... Defendants

Mr. S.C.Pratap i/b. Mr. M.R.Khatri for Plaintiff in support of the Notice of Motion.

Mr. K.G.Presswalla i/b. M/s. Vyas & Bhalwal for Defendant No.1.

Mr. R.Narichania with Ms. I.Sen i/b. Mulla & Mulla & Craigie Blunt & Caroe for the Defendant No.2 to show cause.

CORAM: S.K.SHAH,J.

DATE : 19th September,2006.

P.C.

1. This Notice of Motion is taken out by the Plaintiff for directing the 1st Defendant to bear the

costs and expenses of the witness, Capt. Anthony Heredia, aggregating to US $ 9770.00.

2. The facts of the case are not necessary to be stated in detail as they have been stated by this Court in the order dated 2nd December, 2003. This Court directed the 1st Defendant to bear the costs of the second witness of the Plaintiff for the purpose of cross-examination by the 2nd Defendant who came to be added at the instance of the 1st Defendant after the evidence of the first witness was over. At the time of passing the order dated 2nd December, 2003, Counsel on both sides indicated the costs of Rs.75,000/- to be deposited by the 1st Defendant to meet the expenses of recalling the second witness and this Court had directed the 1st Defendant to deposit the said amount. That amount was accordingly deposited.

3. The contention raised by the learned Counsel for the Plaintiff now is that the witness is based in Australia and is required to be called here for the purpose of cross-examination on behalf of the 2nd Defendant. He has given the expenses of air-fare and other charges for the witness to be called her, the expenses of his stay here, the expenses of his going back and the other expenses. Those expenses come to around US $ 9500 which the Plaintiff is seeking an

order to deposit the said amount.

4. The learned Counsel for the 1st Defendant however submits that once the order has been passed on 2nd December, 2003, this Court cannot revise the said order. I do not find any merit in this submission. The Court can vary its own order if the circumstances so require.

5. The second contention raised on behalf of the 1st Defendant is that the 1st Defendant was directed to deposit Rs.75,000/- and that amount was fixed with the assistance of learned Counsel on both sides. He further submits that the said order was challenged in Appeal before the Appellate Court and the Appellate Court by its order dated 15th April, 2004 disposed of the Appeal. In para 3 thereof, the Appellate Court observed that the submission was made on behalf of the Appellant that additional expenses would be required for calling the witness. The Court further observed that the Appellant would be at liberty to make this submission before the trial Court as and when the suit is decided and the Appeal was disposed of. It is on the basis of these observations of the Appellate Court, the learned Counsel for the 1st Defendant submits that the Plaintiff can raise the question of costs only at the time of decidind the suit. Now,

additional expenses are required to be incurred. However, I find no merit in this submission also.

6. The learned Counsel for the Plaintiff submits that the Appeal was not against the order of deposit of Rs.75,000/- or fixing the amount of deposit, but the Appeal was against the order directing adding of third party as party defendant. He further submits that the principle settled by this Court by order dated 2nd December, 2003 was not disturbed by the Appellate Court.

7. The question today is whether Rs.75,000/- is sufficient to meet the expenses of visit of the 2nd witness who is based in Australia.

8. It is unanimously agreed at the Bar that the minimum costs of recording of evidence and cross-examination by the 2nd Defendant would be by Video Conferencing instead of calling the witness personally here.

9. In this regard, the learned Counsel for the Plaintiff has submitted the Video Conferecning charges. World Trade Centre, Mumbai calculated on the basis of 6 hours.

10. The learned Counsel for the 2nd Defendant however, submits that he would take, at the most, two hours for completing the cross-examination. However, the calculation is made for 3 hours giving grace time if required. Therefore, the charges would be Rs.33,500/- at World Trade Centre. At Sydney, Booking Fee is shown as Australian $ 71.50 which is equivalent to Rs.2,556/- which is rounded to Rs.2,600/-. The Room hire charges at A$ 242 per hour. For 3 hours, it comes to Rs.26,136/-. The costs and expenses of witness shown as US $ 2000 = Rs.93,000/-. Therefore, 50% is Rs.45,000/-. As such, the total amount required to be deposited comes to Rs.1,07,286, making it round to Rs.1,10,000/-. Out of this amount, Rs.75,000/- are already deposited. Therefore, the additional amount which will be required to be deposited comes to Rs.35,000/-.

11. Since the principle has been settled that the costs should be initially deposited by the 1st Defendant, it will be necessary to direct them to deposit further sum of Rs.35,000/- more for meeting the expenses of recording of cross-examination of the second witness on behalf of the 2nd defendant through Video Conferencing.

12. In addition to this, it will be necessary to

appoint Commissioner for recording evidence through the Video Conferencing. Counsel representing the parties also suggest the name of Advocate, Mr. Salil Shah. Accordingly, Mr. Salil Shah is appointed as Commissioner to record the evidence of the witness on Video Conferencing. The fees of the Commissioner, as suggested by the Counsels, is fixed at Rs.10,000/-. Therefore, the additional amount to be deposited by the 1st Defendant would come to Rs.45,000/-. The said amount shal be deposited by the 1st Defendant within three weeks from today.

13. The learned Counsel for the Plaintiff states that a sum of Rs.75,000/- which was allowed to be withdrawn by the Plaintiff earlier under the order dated 2nd December, 2003 has not yet been withdrawn. The Plaintiff is allowed to withdraw the said amount of Rs.75,000/- immediately and the rest of the amount after the same has been deposited by the 1st Defendant in Court. The Plaintiff may start making preparation for the purpose of Video Conferencing.

14. Needless to say that as already directed by this Court in the order dated 2nd December, 2003, all this cost would be subject to the final order with regard to the costs that may be passed.

15. It is further directed that in the Video Conferening Room at Sydney, Australia, nobody should remain present in the Room except the service technicians.

Notice of Motion stands disposed of.

16. The Suit will be placed on Board after four weeks for directions.

Certified copy expedited.

(S.K.SHAH,J.)